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# In the Supreme Court
## of the United States

OCTOBER TERM

No. 1452

PAUL STEFFEN ZORNER,
*Petitioner,*

v.

STATE OF OREGON,
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI**
**To The COURT of APPEALS of the STATE OF OREGON**

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**PETITION FOR WRIT OF CERTIORARI**
**To The COURT of APPEALS of the STATE OF OREGON**

### (1) PREVIOUS OPINION

The opinion of the Court of Appeals of the State of Oregon appears under the name of *In Re Zorner* at 91 Adv. Sh. 689, — Or. App. —, 475 P.2d 990 (1970).

### (2) JURISDICTION

The judgment sought to be reviewed in this case was entered by the Court of Appeals for the State of Oregon on November 2, 1970. The Court of Appeals

denied without opinion, a rehearing on December 1, 1970, and the Supreme Court for the State of Oregon denied without opinion, a Petition for Review on December 15, 1970. Jurisdiction is conferred on this Court by virtue of 28 U.S.C. 1257 (3).

### (3) QUESTION PRESENTED

Was Petitioner denied Due Process of Law under the Fourteenth Amendment to the United States Constitution because the juvenile court denied him the right to a jury in a hearing to determine whether he committed arson, a conclusion that could have deprived Petitioner of his liberty for up to four years?

### (4) (a) CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution:

> ". . . Nor shall any state deprive any person of life, liberty or property without due process of law. . . ."

The Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

## (4) (b) OREGON REVISED STATUTES

ORS 419.476(1):

"The juvenile court has exclusive original jurisdiction in any case involving a person who is under 18 years of age and:

(a) who has committed an act which is a violation, or which if done by adult would constitute a violation, of a law or ordinance of the United States or a state, county or city."

ORS 419.507:

"A child found to be within the jurisdiction of the court as provided in subsection (1) of ORS 419.476, may be made a ward of the court. Where a child has been found to be within its jurisdiction, the court may:

. . . . .

(2) Subject to ORS 179.473 [mental commitments] and 419.509, place the child in the legal custody of a public or private institution or agency authorized to accept the child or if the child is at least 12 years of age, to the Corrections Division. . . ."

ORS 419.509:

"A child found to be within the jurisdiction of the juvenile court shall not be placed in the legal custody of the Corrections Division or in a private institution operated as a training school for children requiring secure custody unless:

(1) The child is found to be within the jurisdiction of the juvenile court by reason of a

ground set forth in paragraph (a) or (b) of subsection (1) of ORS 419.476."

ORS 419.498(1):

"The hearing shall be held informally by the court without a jury. . . ."

## (5) STATEMENT OF THE CASE

On March 2, 1969, a fire broke out at Petitioner's home. Petitioner was at that time fourteen years old and lived with his mother. On May 16, 1969, the State of Oregon filed a petition pursuant to ORS 419.476 (1) (a) alleging that Petitioner had set the fire, committing the crime of arson, and asking that he be put within the jurisdiction of the juvenile court.

Counsel was appointed for him and on June 23, 1969, a hearing was held to determine whether Petitioner had committed arson and should be put within the jurisdiction of the juvenile court. At the beginning of the hearing, the trial judge asked:

"Do you have anything you wish to state?"

Petitioner's attorney answered:

"I am aware of the recent Oregon Supreme Court cases concerning jury trial for a juvenile, and the standard of proof that is required. I am referring to *State* vs. *Arenas*, Or Ad Sh, pg 351 and *State* vs. *Turner*, 88 Ad. Sh, 363. I am aware that these cases were decided in the latter part of April, 1969, subsequent to the U. S. Supreme Court decision in the 'In Re Gault' case. For the record, I do want at this time to request a jury

trial for my client, Paul Zorner. . . . I want the record clear at this point that I have made these requests.

And in my opinion, I think the Supreme Court of Oregon incorrectly interpreted the *In Re Gault* case and I believe that the dissenting opinion written in both of the recent Oregon Supreme Court cases by Justice O'Connell are the correct interpretations of the law with respect to juveniles as it exists since the decision in the *In Re Gault* case. . . ."

The Court:

"What you are raising, Mr. McClaine, is that it is your client's constitutional right under the Sixth and Fourteenth Amendment to the United States Constitution, is this correct?"

Mr. McClaine:

"This is correct, I am raising these rights in view of the *In Re Gault* decision and in view of this case that is before the Supreme Court now."

The Court:

"I will deny your motion on the grounds that Paul is entitled to a jury trial. . . ."

During the hearing the trial judge noted that he had on several occasions contacted Petitioner's mother. The court noted that the mother was a "highly emotional person," and that the court had had a prior history with this family in regard to juvenile proceedings.

On October 15, 1969, the court made a finding

that Petitioner had committed arson and ordered that Petitioner be held within the jurisdiction of the juvenile court for six months and that he and his mother obtain independent counseling through the efforts of his attorney.

On November 7, 1969, Petitioner filed a motion for a new trial or in the alternative a motion for acquittal because, *inter alia*, Petitioner was denied a trial by jury. The court denied the motion on November 12, 1969.

Petitioner then appealed to the Oregon Court of Appeals assigning as error, *inter alia*, "Was it error for the trial judge to deny Appellant's motion for a jury trial when Appellant was charged with arson and when, as a result of the proceeding, Appellant could be incarcerated for several years?"

The Court of Appeals relying on an Oregon Supreme Court opinion, *State* v. *Turner*, 253 Or. 235, 453 P.2d 910 (1969), ruled that the Oregon statute prohibiting a jury trial in juvenile cases, ORS 419-.498(1) should be considered constitutional until the United States Supreme Court held otherwise. 91 Adv. Sh. 689, 692, — Or. App. —, 475 P.2d 990, 991, 992 (1970).

Petitioner then filed a Petition for Rehearing with the Oregon Court of Appeals again raising the constitutionality of the denial of a jury. The Court of Appeals denied a rehearing on December 1, 1970. 91 Adv. Sh. No. 10, 3, — Or. App.— (1970). (No unofficial citation). Petitioner then filed a Petition for

Review with the Oregon Supreme Court, the highest court in the state, which was denied without comment on December 15, 1970. 91 Adv. Sh. No. 11, 5, — Or. — (1970). (No unofficial citation).

Petitioner has, throughout this proceeding raised the constitutionality of ORS 419.498(1) which denies a juvenile a jury in a hearing before the juvenile court. He has now exhausted his state remedies. Therefore, this Court has jurisdiction over the matter.

## (6) REASONS FOR ALLOWANCE OF THE WRIT

On December 10, 1970, this Court heard arguments on two cases, *In Re Burrus*, No. 128 and *McKeiver* v. *Pennsylvania*, No. 322, which presented an issue identical to the one in the instant case. It is clear, therefore, that this Court recognizes the importance of this issue and further discussion of its general significance would be redundant.

In the instant case, there is some reason to believe that a trial by jury would have affected the result. The trial judge had information about petitioner's family that would not have been before a jury and may very well have used it as a basis for finding that Petitioner had set the fire.

While Petitioner is no longer within the jurisdiction of the juvenile court, the adjudication of that court can affect him the rest of his life. If Petitioner ever again comes within the jurisdiction of the juvenile court, the previous finding that Petitioner had

committed arson could be taken into consideration in determining the disposition of his case. Further, he will always have the stigma of that conviction, and his right to enter certain professions may be impaired.

WHEREFORE, Petitioner prays that this Court allow the Petition for Certiorari to the Court of Appeals of the State of Oregon to review its judgment that Petitioner did commit the crime of arson.

Respectfully submitted,

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## APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Department 1

In the Matter of Paul Steffen Zorner, a child.

State of Oregon,

*Respondent,*

v.

Paul Steffen Zorner,

*Appellant.*

. . . . .

Appeal from Circuit Court, Clackamas County.

Howard J. Blanding, Judge.

Argued and submitted September 22, 1970.

N. Robert Stoll, Portland, argued the cause and filed the brief for appellant.

Thomas H. Denney, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Lee Johnson, Attorney General, and Jacob B. Tanzer, Solicitor General, Salem.

Before Schwab, Chief Judge, and Foley and Fort, Judges.

SCHWAB, C. J.

Affirmed.

SCHWAB, C. J.

This is a juvenile case. A petition was filed in juvenile court on May 16, 1969, charging Paul Zorner, then 14 years of age, with wilfully setting fire to the home in which he lived. Counsel was appointed on June 9, and a hearing before the juvenile court was set for June 23. On June 17, the juvenile's counsel moved for a continuance beyond June 23. The motion was denied, as was a motion for a jury trial, and the hearing took place on June 23, and June 30, before the juvenile judge. On October 15, 1969, the court entered its "Order and Disposition," stating in pertinent part:

> "3. The above-named child [Paul Steffen Zorner] is within the jurisdiction of the Court by reason of the following facts:
>
> "From the evidence presented at the hearing held on the 23rd day of June, 1969, said child was found to have set fire to a dwelling,
>
> " . . . . .
>
> "NOW THEREFORE IT IS HEREBY ORDERED AND ADJUDGED:
>
> " . . . . .
>
> "2. THAT the above-entitled matter be continued for a period of six months at which time this will come on for review, and
>
> "3. IT IS FURTHER ORDERED that Paul Steffen Zorner and his mother, Harriet Grace Zorner obtain independent counseling through the efforts of their attorney * * *."

From this order the juvenile appeals,[1] assigning as error (1) the court's denial of the motion for a continuance, (2) the court's denial of defendant's demand for a jury trial, (3) the court's exercise of jurisdiction over the defendant under a statute requiring only "a preponderance of the evidence," and (4) insufficiency of the evidence to support the finding that the defendant committed arson.

The juvenile's attorney filed a motion for continuance eight days after he was appointed and six days before the scheduled hearing. The accompanying affidavit stated as grounds for the continuance that: (1) a number of witnesses had to be interviewed; (2) he had to acquaint himself with the fire and the procedures of fire investigation; and (3) the defendant was attending a music workshop in another city and would not return until about a day before the hearing. No formal ruling was made by the court, but at the hearing, and in answer to the court's question of whether the defendant was ready to proceed, the defendant's attorney answered in the affirmative. After the state had rested, the court did grant the de-

---

[1] On May 1, 1970, the court entered an order terminating jurisdiction. ORS 419.561(1) states:

"Any person whose rights or duties are adversely affected by a *final order* of the juvenile court may appeal therefrom * * *." (Emphasis supplied.)

There may be some question as to whether the order appealed from, the order of October 15, was, in fact, a final and, thus, an appealable order. See *Logsdon* v. *State and Dell*, 234 Or 66, 380 P2d 111 (1963). But see *State* v. *Gates*, 230 Or 84, 368 P2d 605 (1962). Here the state does not challenge the finality of the order appealed from, and we do not consider that question.

fendant a one-week continuance to present his case. The granting of a continuance is within the sound discretion of the trial court, and will not be disturbed unless there is an abuse of discretion and prejudice to the defendant. *State* v. *Young*, 90 Adv. Sh. 17, — Or. App. —, 463 P.2d 374 (1969), and *State* v. *Sands*, 90 Adv. Sh. 1397, — Or. App. —, 469 P.2d 795 (1970).

The juvenile and his attorney had conferred prior to the June 17 request. Counsel had available to him a complete file concerning the occurrence. *State* v. *Young*, supra, states that in seeking a continuance a defendant should demonstrate the problems confronting him were different from those expected in any criminal case. He did not do so here.

In *State* v. *Turner*, 88 Adv. Sh. 363, 253 Or. 235, 453 P.2d 910 (1969), the defendant, on the basis of *Bloom* v. *Illinois*, 391 U.S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968), *Duncan* v. *Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), and *In Re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), challenged the constitutionality of ORS 419.498(1), which denies a juvenile the right to trial by jury in a delinquency hearing. The Oregon Supreme Court, in deciding against the defendant's position, stated:

> ". . . A majority of this court has concluded that the statute should be considered constitutional until the United States Supreme Court holds otherwise." *State* v. *Turner*, supra, at 364.

ORS 419.500(1) allows a finding of jurisdiction

over a juvenile by a preponderance of the evidence. *State* v. *Arenas*, 88 Adv. Sh. 351, 253 Or. 215, 453 P.2d 915 (1969), upheld the constitutionality of this statute. In the Matter of Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), held that a finding of guilt in a juvenile case must be beyond a reasonable doubt. Here, the trial judge recognized and applied the *Winship* standard. In an order entered on September 10, after the hearing was concluded, but prior to the order appealed from, he said that he found from the evidence:

> ". . . [B]eyond a reasonable doubt, that the child . . . did wilfully set fire to the residence . . . ."

The remaining question is whether the evidence demonstrates that "beyond a reasonable doubt" the defendant set fire to his dwelling. Assuming that ORS 419.561(4)[2] requires us to try this matter de novo on the record, we conclude that the trial judge's finding was correct. This issue turns largely on the credibility of witnesses, particularly the credibility of the defendant, and for this reason we give great weight to the trial judge's finding. *Hannan* v. *Good Samaritan Hospital*, 90 Adv. Sh. 1517, — Or. App. —, 471 P.2d 831 (1970).

"Both the criminal agency in the origin of the fire and the identification of the accused as the

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[2] ORS 419.561(4) provides:

"An appeal to the Court of Appeals shall be conducted in the same manner as an appeal in an equity suit and shall be advanced on the court's docket in the same manner as appeals in criminal cases."

> one who committed the crime charged may be established by circumstantial evidence . . . ." *State* v. *Director*, 113 Or. 74, 84, 227 P. 298, 231 P. 191 (1924).

The evidence is that the fire was of incendiary origin, and that it started inside the Zorner residence. The juvenile admits he was in the residence when the fire started. It is clear from the record as a whole that he was the only person inside the residence at the time. His hair was singed. At the trial he suggested that the fire could have been started by someone throwing something through the living room window. In an attempt to argue that hypothesis to the court, the defendant refers in his brief to the traffic on the road adjacent to the Zorner residence and to the presence of a state's witness in the Zorner front yard a few minutes before the fire started. However, this conjecture is clearly refuted by the expert testimony that the fire had two distinct points of origin; one in the living room and one in the dining room.

Affirmed.

IN THE CIRCUIT COURT OF THE
STATE OF OREGON

JUVENILE DEPARTMENT

| | |
|---|---|
| In the Matter of<br>PAUL STEFFEN ZORNER<br>In the Matter of<br>A child ---------- | No. 6741<br>ORDER AND<br>DISPOSITION |

The above-entitled matter having come on for hearing on the 10th day of October, 1969, upon the petition of and Summons of this Court praying that investigation be made of the circumstances concerning the above-named child Paul Steffen Zorner the following persons being present at the hearing:

Judge Howard J. Blanding presiding.

Mrs. Harriet G. Zorner; Paul Steffen Zorner; their attorney Robert Stoll and Counselor Michael Falkenstein

and it appearing to the Court, and the Court finding that:

1. Due notices of this proceeding has been given to all persons interested herein, according to the statutes in such cases made.

2. The child, Paul Steffen Zorner (resides) in the County of Clackamas and is 15 years of age.

3. The above-named child ---------- is within the jurisdiction of the Court by reason of the following facts:

From the evidence presented at the hearing held on the 23rd day of June, 1969, said child was found to have set fire to a dwelling,

The Court being fully advised in the premises:

NOW THEREFORE IT IS HEREBY ORDERED AND ADJUDGED:

THAT the above-entitled matter be continued for a period of six months at which time this will come on for review, and

IT IS FURTHER ORDERED that Paul Steffen Zorner and his mother, Harriet Grace Zorner, obtain independent counseling through the efforts of their attorney Robert Stoll.

Dated this 15th day of October, 1969.

/s/ *Howard J. Blanding*
Judge

Supreme Court, U.S.
FILED
SEP 3 1971
E. ROBERT SEAVER, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1452

PAUL STEFFEN ZORNER,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

## BRIEF FOR RESPONDENT IN OPPOSITION

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PAUL STEFFEN ZORNER,

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STATE OF OREGON,

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On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

## BRIEF FOR RESPONDENT IN OPPOSITION

## PREVIOUS OPINION

## JURISDICTION

## QUESTION PRESENTED

## CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

## STATEMENT OF THE CASE

Respondent accepts as accurate the petitioner's statement of the opinion below, jurisdiction, question presented, constitutional and statutory provisions involved and the case.

## REASONS FOR DENIAL OF THE WRIT

### The Writ Would Have Minimal Effect

As petitioner points out (Pet. 6), the issue of whether the Sixth Amendment requires a jury trial is already pending before the Supreme Court in *In Re Burrus*, No. 128, and *McKeiver v. Pennsylvania*, No. 322, both of which were argued on December 10, 1970. The issue will be resolved whatever action is taken on this petition. Thus a grant of certiorari in the case at bar will have no effect beyond this individual case, except, possibly, as a vehicle for additional briefing and argument.

If there is negligible significance in other cases, there is also precious little relief to be granted in the very case at bar. As petitioner indicates, he is no longer within the jurisdiction of the juvenile court (Pet. 7) inasmuch as his six month probationary period has expired. He suffers no disability by virtue of the expired wardship. Oregon juvenile files are secret—although, inconsistently, the appellate decision is titled with the name of the juvenile. Petitioner's assertion that "his right to enter certain professions may be impaired" is speculative at best and is equally true of every petitioner from a juvenile wardship or an adult conviction.

Given the minimal effect that a grant of certiorari will have upon this and other cases, then this case should be controlled by such rules of retroactivity as the Court fashions in Nos. 128 and 322 if it is decided there that jury trials are mandated for juvenile proceedings.

**Jury Trials for Juveniles Are Not Desirable**

*In Re Gault*, 387 US 1 (1967) reasoned that many juvenile correctional facilities are effectively penal and therefore the process by which society sends juveniles to such facilities must provide those rights which, as a matter of due process, are appropriate to juvenile courts.

If the disappointing reality of juvenile facilities has been penal instead of benevolent, then it does the juvenile no good to accord to him more due process on his legal path to the facility. The state will "convict" juveniles with the same regularity that it convicts adults. The resources of the law would be better put to reform of juvenile institutions than to the adornment of the proceeding with all the trappings of adult criminal trials.

*Gault* does not convert juvenile proceedings into adult criminal trials for under-age defendants. In obviating the worst of juvenile proceedings, *Gault* does not also eliminate the best by full scale duplication of criminal procedure. Although jury trial is among the criminal procedure due process package, *Duncan v. Louisiana*, 391 US 145 (1968), it does not follow that it is a necessary or desirable part of the juvenile court due process package. Jury trial is required by due process only if it is functionally desirable in the juvenile setting. As one commentator better stated the proposition:

> "Other constitutional rights, both state and federal, need to be scrutinized with the following questions in mind. What do they have to offer to the juvenile court system? Will they merely make it more formal or will they serve a real need? At least

> one author has urged that 'children accused of acts that would be crimes if committed by adults are entitled as of constitutional right in the juvenile courts to all constitutional safeguards recognized in that jurisdiction to those charged with crimes in the usual criminal courts.' This is too far reaching. What is needed is a selective due process adapted to the peculiar needs of a juvenile court. The reasoning in *Gault* can be analyzed and expanded in order to determine what additional rights, if any, will fall into this category." (Footnote omitted) *Constitutional Rights of Juveniles*, 9 Wm & Mary L Rev 492, 500 (1967)

Each of the rights accorded a juvenile by *Gault* and *In Re Winship*, 397 US 358 (1970) is functionally justifiable as serving a sound judicial purpose. The rights to notice, counsel, confrontation, proof beyond reasonable doubt, transcript and appellate review each contribute substantially to the quality of the fact-finding process and effectively inhibit the possibility of administrative or judicial arbitrariness. They allow the fact-finder to perform that function directly and informedly. The protection against self-incrimination contributes to the integrity of the investigative process. Jury trial, however, does not rise to the same level of functional necessity in a juvenile court setting.

Use of a jury must be evaluated on its own merits in the setting of juvenile court desiderata, just as *Gault* considered the appropriateness of each right. What need would a jury obviate; what present benefit would it dilute? The petitioner has demonstrated no such need, but many benefits would be lost.

Jury trial, more than any other procedural device, would dilute the primary aim of juvenile process. It would totally change the character of the informal, confidential juvenile hearing. Instead of interested parties and counsel gathered in chambers, the proceeding would be moved to the formal atmosphere of the courtroom with elevated judge, the parties and counsel below partitioned by adversary tables, and the judge and youth separated by 12 on-looking strangers. Neither the setting nor the clash and clamor of a jury trial would be beneficial to the child or conducive to the establishment of rapport. The value of the rapport between judge and juvenile, facilitated by the informal atmosphere of the juvenile court, is acknowledged by *Gault*.

There is no substantial reason to deem the jury a superior fact-finder to an experienced juvenile court judge. The requirement that a jury be of a defendant's "peers" is problematical. Jurors are valued because they bring with them a range of generalized experience against which they judge the evidence. In a juvenile proceeding, however, a more specific sort of experienced understanding is required. A juvenile judge can acquire such background through years of dealing with every variety of juvenile, while a typical juror's special background would be limited to his experience, good or bad, with his own family or to public media accounts of how each current generation "is going to hell." The sort of understanding hearing which is peculiarly desirable in juvenile proceedings is better available before the judge.

While the essential purpose of trial by jury is to interpose protection of criminal defendants from the oppressiveness of the Crown, *Williams v. Florida*, 399 US 88, 99-100 (1970), a judge would better shield a child from the oppressiveness of the adult community. A judge can best decide whether a wardship is required.

The essentially protective purpose of jury trial is satisfied by other devices. The *Gault* and *Winship* safeguards, particularly comprehensive appellate review, have diminished the degree of importance of the early device of jury trial as a safeguard. Its newly marginal value should be weighed against competing desiderata in juvenile cases which are not as meaningful in adult cases, e.g., protection of the youth from the stigma of public prosecution; a setting which facilitates a benevolent relationship and protective atmosphere. These competing benefits are not otherwise achieved and are thus to be preferred. *Cf. Constitutional Rights of Juveniles*,9 Wm & Mary L Rev 492 at 500-501 (1967).

## CONCLUSION

Because of the minimal impact of a Supreme Court decision of the instant case and because jury trials should not be constitutionally required for juveniles, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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